

No. 12971

United States
Court of Appeals
for the Ninth Circuit.

See vol. 2684

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ESTATE of R. L. LANGER, Deceased; ELEANOR
LANGER, Executrix,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner :

DANA LATHAM, ESQ.,

AUSTIN H. PECK, JR., ESQ.,

HENRY C. DIEHL, ESQ.,

For Respondent :

L. C. AARONS, ESQ.

The Tax Court of the United States

Docket No. 16756

R. L. LANGER,

Amended Caption:

ESTATE OF R. L. LANGER, Dec'd.; ELEA-
NORE LANGER, Executrix (See Order of
8/31/48),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1947

Dec. 17—Petition received and filed. Taxpayer noti-
fied. Fee paid.

Dec. 18—Copy of petition served on General Coun-
sel.

Dec. 22—Request for hearing at Los Angeles, Cali-
fornia, filed by taxpayer. 12/29/47 granted.

1948

Jan. 26—Answer filed by General Counsel.

Jan. 27—Copy of answer served on taxpayer. Los
Angeles Calendar.

Aug. 30—Motion for substitution of party, filed by
taxpayer.

Aug. 31—Order amending caption to read, Estate
of R. L. Langer, Deceased, Eleanore
Langer, Executrix, entered.

Dec. 23—Hearing set February 7, 1949, in Los An-
geles, California.

1949

- Feb. 9—Hearing had before Judge Johnson on merits. Petitioner's oral motion to consolidate with Dkt. 16757, 18396 and 18397—Granted. Oral motions of petitioners in Dkts. 18396 and 18397 were also granted to file amended petitions. Respondent granted time or oral motion to file amended answers. Submitted. Stipulation of facts with Exhibits 7 to 25 attached filed at hearing also amended petition in Nos. 18396 and 18397 were filed. Petitioner's brief due 3/11/49, Respondent's brief 4/11/49 and Reply brief 5/2/49.
- Mar. 14—Motion for extension to 3/15/49 to file the attached brief, brief lodged, filed by taxpayer. 3/15/49 granted and served.
- Mar. 18—Transcript of hearing 2/9/49 filed.
- Apr. 11—Brief filed by General Counsel. Copy served 4/12/49.
- Apr. 25—Reply brief filed by taxpayer. 4/26/49 copy served.
- Sept. 29—Findings of fact and opinion rendered. Judge Johnson. Decision will be entered for respondent.
- Sept. 29—Decision entered. Judge Johnson. Div. 10.
- Dec. 12—Petition for review by U. S. Court of Appeals, 9th Circuit, filed by taxpayer.
- Dec. 12—Notice of filing petition for review with affidavit of service attached, filed.
- Dec. 12—Designation of record and statement of points filed by taxpayer.

1949

- Dec. 12—Notice of filing designation of record and statement of points with affidavit of service attached.
- Dec. 28—Motion for continuance to 1/9/50 to file a counter designation of record filed by General Counsel.

1950

- Jan. 11—Notice transmitting the original papers which constitute the record on review to the Ninth Circuit.
- Aug. 21—Mandate from the U. S. Court of Appeals, 9th Circuit reversing and remanding Tax Court's decision filed.
- Nov. 24—Hearing set 1/22/51 Los Angeles, Calif.

1951

- Jan. 12—Findings of Fact and Opinion rendered. Johnson J. Decision will be entered under Rule 50. Copy served.
- Mar. 30—Respondent's Computation for entry of decision filed.
- Mar. 30—Consent to computation for entry of decision filed.
- Apr. 3—Decision entered, J. Johnson, Div. 10.
- May 3—Petition for Review by U. S. Court of Appeals for the Ninth Circuit filed by General Counsel.
- May 8—Notice of filing petition for review mailed to Mrs. Eleanore Langer with Proof of service attached thereto filed.

1951

- May 8—Notice of filing petition for review mailed to Dana Latham, Esq., or Austin H. Peck, Jr., Esq., or Henry C. Diehl, Esq., with proof of service thereon, filed.
- May 31—Statement of Points filed by General Counsel with statement of service by mail thereon.
- May 31—Designation of record filed by General Counsel with statement of service by mail thereon.

The Tax Court of the United States
Docket No. 16756

R. L. LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated September 24, 1947, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 939 South Figueroa Street, Los Angeles 15, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to petitioner on September 24, 1947.

III.

The taxes in controversy are federal income taxes for the calendar year 1944, in the amount of \$3,086.48.

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$5,000.00, representing petitioner's community one-half of \$10,000.00 compensation for personal services attributable to the years 1937, 1938, and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1937, 1938, and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$5,000.00 of income at the rates applicable for the years 1937, 1938, and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar

year 1944 and erroneously failed and refused to apply said section in making such computation.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1944 and up to and including the present date, petitioner has been an officer of the Commodore Hotel Co., Ltd., 1203 West Seventh Street, Los Angeles, California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors, evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to pay to petitioner monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1937, 1938 and 1939, said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner the sum of \$10,000.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner for the years 1937, 1938, and 1939.

(5) In preparing his federal income tax return for the calendar year 1944 petitioner and his wife reported as community property the receipt of said \$10,000.00 and computed the tax thereon in accordance with the provisions of Section 107 (d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

Wherefore petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

December 11, 1947.

State of California,
County of Los Angeles—ss.

R. L. Langer, being first duly sworn, deposes and says: That he is the petitioner in the foregoing petition; that he has read said petition and is familiar with the facts contained therein, and that said facts are true and correct to the best of his knowledge and belief.

/s/ R. L. LANGER.

Subscribed and sworn to before me this 12th day of December, 1947.

[Seal] /s/ ISABEL V. HUGHES,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT A

Form 1279

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of Sept. 24, 1947.
Internal Revenue Agent in Charge
Los Angeles Division,
LA:IT:90D:LHP

Mr. R. L. Langer
c/o Hotel Figueroa
939 South Figueroa Street
Los Angeles 15, California

Dear Mr. Langer:

You are advised that the determination of your income tax liability for the taxable year ended De-

cember 31, 1944, discloses a deficiency of \$3,086.48, as shown in the statement attached.

In accordance with the provisions of existing internal revenue law notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of waiver

STATEMENT

LA:IT:90D:LHP

Mr. R. L. Langer
 c/o Hotel Figueroa
 939 South Figueroa Street
 Los Angeles 15, California

Tax Liability for the Taxable Year Ended December 31, 1944
 Income tax deficiency.....\$3,086.48

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 21, 1947.

Adjustment to Net Income
 Taxable Year Ended December 31, 1944

Net income as disclosed by return.....\$29,912.40
 Additional income:
 (a) Compensation unreported 500.00
 Net income adjusted\$30,412.40

Explanation of Adjustment

(a) There is added to income the amount of \$500.00 representing your community share of the value of living quarters and meals furnished you by your employer, during this taxable year, which you failed to reported in your return.

In your return you disclose receipt in 1944 of compensation for personal services in the amount of \$5,000.00 (your community one-half of \$10,000.00) attributable to the years 1937, 1938 and 1939, which you include in gross income. However, in the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1944.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,000.00 represents income taxable at the rates in effect in the year received.

Computation of Tax

Taxable Year Ended December 31, 1944

Net income adjusted	\$30,412.40	
Less: Surtax exemption.....	500.00	
	<hr/>	
Surtax net income	\$29,912.40	
Surtax		\$13,165.69
Net income adjusted.....	\$30,412.40	
Less: Normal-tax exemption	500.00	
	<hr/>	
Net income subject to normal tax.....	\$29,912.40	
Normal tax at 3%.....		897.37
		<hr/>
Correct income tax liability.....		\$14,063.06
Income tax liability shown on return account No. 9005526		10,976.58
		<hr/>
Deficiency of income tax.....		\$ 3,086.48

Received and filed T.C.U.S. December 17, 1947.

Served December 18, 1947.

Received T.C.U.S. August 21, 1950.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the taxes in controversy are income

taxes for the calendar year 1944. Denies the remainder of the allegations contained in paragraph III of the petition.

IV.

Denies the allegations of error contained in paragraph IV of the petition.

V.

(1) to (4), inclusive. Denies the allegations contained in subparagraphs (1) to (4), inclusive, of paragraph V of the petition.

(5) Admits the allegations contained in subparagraph (5) of paragraph V of the petition.

VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner of Internal Revenue be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel;

E. C. CROUTER,
Special Attorney,
Bureau of Internal Revenue.

Received and filed T.C.U.S. January 26, 1948.

The Tax Court of the United States
Docket Nos. 16756, 16757, 18396 and 18397

Promulgated January 12, 1951

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

C. ABBOTT LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PAULINE LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

On remand from the United States Court of Appeals for the Ninth Circuit, held:

(1) Back pay of \$10,000 received by decedent R. L. Langer in 1944, and of \$10,000 and \$11,500 received by petitioner C. Abbott Lindsey in 1944 and 1945, respectively, was paid pursuant to prior agreement and legal obligation within the meaning of Regulations 111, section 29.107-3.

(2) Above back pay of \$10,000 received by decedent R. L. Langer constituted more than 15 per cent of the gross income of R. L. Langer and Eleanore Langer in 1944, and petitioners' Estate of R. L. Langer, Deceased; Eleanore Langer, Executrix, and Eleanore Langer are entitled to the benefits of section 107(d), Internal Revenue Code, with respect thereto.

(3) Above back pay of \$10,000 and \$11,500 received by petitioner C. Abbott Lindsey constituted less than 15 per cent of the gross income of petitioners C. Abbott Lindsey and Pauline Lindsey in 1944 and 1945, respectively, and they are not entitled to the benefits of section 107(d), Internal Revenue Code, with respect thereto.

AUSTIN H. PECK, JR., ESQ.,

For the Petitioners.

L. C. AARONS, ESQ.,

For the Respondent.

These proceedings return to us by mandate of the United States Court of Appeals for the Ninth Circuit, issued under its opinion of July 14, 1950, 183 Fed. (2d) 758, reversing our prior decision of September 29, 1949, in these proceedings (Findings of Fact and Opinion reported at 13 T.C. 419). The mandate directs:

It is now here ordered and adjudged by this court, that the decision of the said Tax Court of the United States in each of these causes be, and hereby is reversed, and that these causes be, and hereby are remanded to the said Tax Court with directions to proceed in accord with the opinion of this court, and to dispose of other issues presented on the record.

We therefore proceed as directed by the mandate. In addition to the facts heretofore found, which by reference are adopted here, we find on the same record as follows:

Findings of Fact

The net rentals from the Clifton Hotel were apportioned on Schedule B of the 1944 returns of R. L. Langer and Eleanore Langer as follows:

Net Rentals\$14,498.01

Apportionment among owners:

R. L. & Eleanore Langer $\frac{1}{2}$ \$7,249.00

Nelda Clinton $\frac{3}{8}$ 5,436.75

Mary R. Brown..... $\frac{1}{8}$ 1,812.26 \$14,498.01

The net profits from the Figueroa Hotel were

apportioned on Schedule C of the Langers' 1944 returns as follows:

Net Profit	\$59,441.42
Clifford Clinton	\$21,165.53
R. M. Callicott.....	7,055.18
	<hr/>
	\$28,220.71
R. L. & Eleanore Langer.	31,220.71 \$59,441.42
	<hr/>

This represents a distribution of $\frac{3}{8}$ of the net profits from the Figueroa Hotel to Clifford Clinton, $\frac{1}{8}$ to R. M. Callicott, and $\frac{1}{2}$ to the Langers, with \$3,000 additional, or \$250 per month, being distributed to the Langers as administration expense, in accordance with a joint venture agreement between R. L. Langer, Clifford Clinton and R. M. Callicott, evidenced by the following memorandum executed September 22, 1945:

Memorandum of Agreement

This memorandum, executed September 22nd, 1945, by R. L. Langer, Clifford E. Clinton and Ransom M. Callicott, of Los Angeles, California, evidences and confirms the terms of a financing and profit-sharing agreement in the nature of a limited joint venture entered into between them before execution of the lease hereinafter mentioned and ever since effective, as follows:

1. Upon the consideration and agreement herein expressed the parties joined in providing and contributing the moneys paid by said Langer in acquiring said lease and commencing operations

thereunder; which lease dated June 1, 1945, (and recorded in Book 13415, pp. 270-279, of Official Records of Los Angeles County, Cal.) was made by Figueroa Hotel Company, as lessor, to said Langer, as lessee, affecting, for ten years then beginning, the property and furnishings thereof known as "Figueroa Hotel," at Figueroa Street and Olympic Boulevard in said City of Los Angeles, and was extended by agreement between said parties thereto, dated July 21, 1939, for an additional term ending May 31, 1949.

2. Upon such consideration it was and is so agreed the parties shall be entitled to and that there shall be shared between them in the proportions of:

Langer	one-half,
Clinton.....	three-eighths, and
Callicott.....	one-eighth,

all net profits and losses accruing from operation of said property while under such lease and extension or any further such extension or lease to him, or which he shall be instrumental in obtaining as to said property for any member of his family or corporation in which he or they shall be interested, or resulting from any sale or disposition of any such leasehold (this agreement to continue in effect so long as any such lease or leasehold shall be in effect); and that said other parties shall be entitled, though not required, to participate, in the proportions aforesaid, with said Langer or any such lessee in any opportunity to him or such lessee to pur-

chase said property during or at expiration of any such leasehold.

Such net profit from operation of said property shall include all gross receipts and revenue accruing and received therefrom, after deduction of only current expenses of such operation, including rental and other charges payable under such then lease; provided while Langer shall hereafter personally continue management of such operation he may deduct and retain from such profit for each month, before division thereof and in like manner as an expense of such operation, \$350.00 (the similar deduction of \$250.00 per month for approximately three years next prior hereto being approved).

Accounting and settlement in accordance herewith has been made as to such net profit for the period ending September 22, 1945, and shall be final save for errors. Further such accounting and payment shall be made monthly. Langer shall keep and maintain at a convenient place at Los Angeles full and complete books, accounts and records of such operation and profit, and the same shall be open to inspection of the other parties and their representatives at all reasonable times with the right to make extracts or copies.

3. Langer shall endeavor to procure extensions of such existing leasehold or further leases of said property as possible from time to time so that this agreement may continue effective as aforesaid. He shall promptly notify the other parties in advance of each such further extension or new lease and proposals therefor. So far as possible each thereof

shall be made only on terms first approved in writing by the other parties hereto; but should that be impossible Langer may nevertheless make the same on other terms, subject to the right of the other parties at their election to terminate this agreement effective at commencement of the term of any such lease or extension on terms not so approved by them.

4. During continuance hereof Langer and his successors shall not, without the other parties' written consent, transfer, assign or hypothecate the then leasehold interest in such property or consent to modification or termination thereof, or sublet the property other than as incident to usual hotel operation, and shall promptly discharge the obligations of such leasehold and continue operation of said property in the same general manner as heretofore but shall not incur any unusual expense which might affect such profits without written consent of the parties.

5. Under and pursuant to such agreement, the subject matter thereof, and the respective rights and interests of the parties thereunder were and are only such as shall be consistent with and not in violation, or constituting in creation thereof, any violation of said lease.

The respective interests of the parties hereunder are assignable and shall be unaffected by death of any of them; and the same and this agreement and its obligations shall inure to the benefit of and bind the parties, their heirs, successors and assigns in

accordance with the terms thereof and as if parties hereto in the capacity of the party through whom claiming.

In Witness Whereof, they execute this instrument on the date aforesaid.

[Signed] R. L. LANGER,

[Signed] CLIFFORD E. CLINTON,

[Signed] RANSOM M. CALLICOTT.

The Clifton Hotel was operated as a joint venture in 1944 by the Langers in conjunction with Nelda Clinton and Mary R. Brown. The Figueroa Hotel was operated as a joint venture in 1944 by the Langers in conjunction with Clifford Clinton and R. M. Callicott. The Langers' distributive share of the net profits in that year from such joint ventures was \$7,249, or \$3,624.50 apiece, from the Clifton Hotel, and \$31,220.71, or \$15,610.35 apiece, from the Figueroa Hotel.

The back pay of \$10,000 received by R. L. Langer in 1944 from the Commodore Hotel Company, allocable \$5,000 to R. L. Langer and \$5,000 to Eleanore Langer, comprised more than 15 per cent of their respective gross incomes of \$30,729.45 and \$31,854.43.

The gross income reported by the Lindseys in 1944 was \$44,183.52, or \$22,091.76 apiece. Their gross income for 1944 was actually \$101,569.40, or \$50,784.70 apiece, computed to include "other business deductions" of the Commodore Cafe, amounting to \$57,385.88. The back pay of \$10,000

received by C. Abbott Lindsey in 1944 from the Commodore Hotel Company, allocable \$5,000 to Lindsey and \$5,000 to Pauline Lindsey, comprised less than 15 per cent of such gross incomes.

In 1945 the total receipts of the Commodore Cafe, as reported by the Lindseys, were \$144,897.99, cost of goods sold \$58,911.83, other business deductions \$65,564.72. The gross income reported by the Lindseys in 1945 was \$52,493.82, or \$26,246.91 apiece. Their gross income for 1945 was actually \$118,058.54, or \$59,029.27 apiece, computed to include "other business deductions" of the Commodore Cafe, amounting to \$65,564.72. The back pay of \$11,500 received by C. Abbott Lindsey in 1945 from the Commodore Hotel Company, allocable \$5,750 to Lindsey and \$5,750 to Pauline Lindsey, comprised less than 15 per cent of such gross incomes.

Opinion

Johnson, Judge:

The Court of Appeals for the Ninth Circuit determined in *Estate of R. L. Langer v. Commissioner*, 183 Fed. (2d) 758; reversing 13 T.C. 419, that the deferment in payment of the amounts of back salary here in question was caused by an event similar to receivership within the requirement of section 107(d)(2)(A), Internal Revenue Code, contrary to the contention of respondent and to our prior holding. Respondent, however, also contends that section 107(d) is not applicable because the employer was under no obligation to pay in prior years, and because the payments were less than 15 per cent of

petitioners' gross incomes, which he says should be computed to comprise receipts undiminished by the expenses of businesses from which they derived income. Pursuant to mandate we now consider these contentions, which we found it unnecessary to consider under our prior holding.

Respondent points out that under Regulations 111, section 29.107-3, "back pay" does not include "additional compensation for past services when there was no prior agreement or legal obligation to pay such additional compensation * * *." He maintains that except as to part of the year 1937, petitioners' salaries were authorized retroactively by the board of directors of the Commodore Hotel Company on January 3, 1944, that there was no prior agreement or legal obligation to pay such salaries, and that the resolution of the board of directors of April 14, 1937, that salaries of \$600 a month be paid Langer and Lindsey from January 1, 1937, and "every month hereafter" was intended for one year only. Petitioners maintain that the 1937 authorization was a continuing one and extended beyond the year.

We think the facts clearly support petitioners on this issue. The salaries were voted in 1937 and we do not understand the resolution to cover only 1937, especially in view of the phrase "every month hereafter." But whatever period the resolution covered, the presumption is that petitioners' services after 1937 were not gratuitous and that the parties intended the same compensation. As said in 6A Cal. Jur. 1125:

If an officer is hired at a fixed salary and continues in the same employment after expiration of the term of his original hiring without a new contract, it is presumed that the parties intend the same compensation.

See also, Fletcher, *Cyclopedia of Corporations*, Vol. 16, pp. 440-41; *Caminetti v. Prudence Mut. Life Ins. Assn.*, 62 Cal. App. (2d) 945, 146 Pac. (2d) 15; *Perry v. J. Noonan Furniture Co.*, 8 Cal. App. 35, 95 Pac. 1128. The facts show that the Commodore Hotel Company failed to pay salaries from 1937 to 1942 because it was not able to do so, not because it was not liable to do so. The 1944 authorization recognized that there were owing to the officers specific amounts of back salary for 1937, 1938, 1939, 1940, 1941, and 1942. In other words, the 1944 authorization was not a retroactive authorization but a recognition of a liability that already existed, and it merely directed the satisfaction of that liability as soon as possible. The fact that the corporation paid the back salaries without approval of the Salary Stabilization Unit of the Treasury after being informed by the latter that it could do so without approval only if "there was a bona fide contractual liability on October 3, 1942," also supports our conclusion that such a liability existed. We can not assume that the corporation violated the law.

Respondent also contends that petitioners have failed to meet the requirement of section 107(d) that in order for a taxpayer to be entitled to the benefits of that section, the amount of back pay

received or accrued during the taxable year must exceed 15 per cent of the taxpayer's gross income for that year. Petitioners contend that only the net profits derived from the operation of the Commodore Cafe in 1944 and 1945, i.e., gross receipts less cost of goods sold and other business deductions, are includible in the gross incomes of the Lindseys in 1944 and 1945 for purposes of section 107(d). They concede that "if gross receipts are to be used in determining the percentage under section 107(d), the Lindseys are not entitled to the relief which they have claimed. Likewise, if gross sales, less cost of goods sold, is the correct figure, the relief is lost." In effect, they are claiming that the adjusted gross incomes of the Lindseys in 1944 and 1945, which include only net profits from business, should be the figures upon which the 15 per cent should be computed for purposes of section 107(d).

We disagree. The statute plainly says "gross income," not "adjusted gross income." Whenever Congress has intended a percentage to apply to "adjusted gross income," it has said so, as in the allowance for charitable contributions under section 23(o), or for medical expenses under section 23(x). Similarly, when it has intended a percentage to apply to "gross income," as in section 275(c), it has also said so. We can not therefore impute an intention on the part of Congress to refer to "adjusted gross income" in section 107(d) when it has plainly said "gross income."

In defining "gross income from business," section 29.22(a)-5 of Regulations 111, provides:

In the case of a manufacturing, merchandis-

ing, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. In determining the gross income subtractions should not be made for depreciation, depletion, selling expenses, or losses, or for items not ordinarily used in computing the cost of goods sold.¹ * * *

The back pay received by Lindsey of \$10,000 in 1944 and \$11,500 in 1945, allocable half to his wife, not being more than 15 per cent of the gross incomes of the Lindseys of \$101,569.40, or \$50,784.70 apiece, in 1944, and \$118,058.54, or \$59,029.27 apiece, in 1945, computed to include gross receipts from the Commodore Cafe less cost of goods sold, they are not entitled to the relief of section 107(d).

As for the Langers, the other petitioners herein, the facts show that they reported income in 1944 from the operation of the Clifton Hotel and the Figueroa Hotel. In each hotel the interest of the Langers was 50 per cent. The other owners of the Clifton Hotel were Nelda Clinton, who owned 37½ per cent, and Mary R. Brown, who owned 12½ per cent. The other owners of the Figueroa Hotel were Clifford E. Clinton, who owned 37½ per cent, and R. N. Callicott, who owned 12½ per cent. The Langers reported on the schedules of their 1944 returns the gross receipts from these two hotels,

¹This fundamental concept of "gross income" from business as gross receipts less cost of goods sold has stood unchallenged for many years. See *Mim.* 2915 and *I.T.* 1241, *I-1 C.B.* 233, 234.

but they brought forward to the face of the returns only their 50 per cent share of the net profits from each hotel, i.e., gross receipts less business expenses less the 50 per cent share of the net profits apportioned to the other owners. Petitioners contend that only this net amount is includible in the Langers' gross income for purposes of section 107(d). They maintain that these two hotels were operated by the Langers and the co-owners as joint ventures. They point out that if the joint ventures had filed partnership returns as they should have,² the business expenses of the joint ventures would have been deducted on the partnership returns and only the Langers' distributive share of the net profits from these ventures would have been reported on their individual returns.

Respondent does not question the division of the income from these hotels between the Langers and their co-owners, and he concedes that if partnership returns had been filed, he would not question the

²Sec. 3797. Definitions.

Internal Revenue Code.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) Partnership and Partner.—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

Langers' inclusion of only their share of the net profits from such ventures in their individual gross incomes for purposes of section 107(d). But he maintains that in view of the failure to file partnership returns petitioners can not now contend that these were joint ventures and compute the Langers' individual gross incomes as though partnership returns had been filed.

We do not agree. The determination of whether or not an undertaking is a joint venture or partnership does not depend on whether or not a partnership return was filed, and respondent gives no other reason for challenging the existence of these joint ventures. We have found on the facts that joint ventures did exist between the Langers and their co-owners in the operation of the Figueroa and Clifton Hotels in 1944. Accordingly, partnership returns should have been filed and the Langers are entitled to include, as they did, in their gross incomes for 1944 only their distributive shares of the net profits of the joint ventures. The \$10,000 in back pay received by Langer in 1944, allocable \$5,000 to him and \$5,000 to his wife, constituted more than 15 per cent of their gross incomes (\$30,729.45 for Langer and \$31,854.43 for his wife) so computed, and, being otherwise within the provisions of section 107(d), Internal Revenue Code, petitioners Estate of R. L. Langer and Eleanore Langer are entitled to the benefits of that section with respect to that back pay.

Decisions will be entered under Rule 50.

Served January 12, 1951.

The Tax Court of the United States
Washington

Docket No. 16756

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to mandate of the Court of Appeals for the Ninth Circuit filed August 17, 1950, and Findings of Fact and Opinion of this Court promulgated January 12, 1951, the respondent herein, on March 30, 1951, filed a computation of tax, in which petitioner filed an agreement on March 30, 1951. Now, therefore, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1944 in the amount of \$2,762.46, which amount was paid after the mailing of the notice of deficiency.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered Apr. 3, 1951.

Served Apr. 4, 1951.

United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 16756

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,
Respondent on Review.

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby petitions for review by the United States Court of Appeals for the Ninth Circuit of the decision entered by the Tax Court of the United States on April 3, 1951, ordering and deciding that there is an overpayment in income tax for the year 1944 in the amount of \$2,762.46, which amount was paid after the mailing of the notice of deficiency. The decedent's income tax return for the year 1944 was filed with the Collector of Internal Revenue for the Sixth District of California, located at Los Angeles, whose office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The question presented for adjudication is whether the taxpayer's receipt of back pay during the taxable year 1944 constituted more than 15 per cent of his gross income received during that year. The Tax Court holds that in computing the 15 per cent limitation it is necessary to include in gross

income only the distributive shares of the net profits realized from the operation of a joint venture conducted under the name of the Figueroa Hotel. The Commissioner contends that the decision conflicts with the definition of "gross income from business" contained in Section 29.22(a)-5 of Regulations 111 and with I.T. 3981, 1949-2 C.B. 78.

The Commissioner files his petition for review pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

Filed T.C.U.S. May 3, 1951.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Mrs. Eleanore Langer, Executrix, Estate of R. L. Langer, Deceased, c/o Figueroa Hotel, 939 South Figueroa Street, Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of May, 1951, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for

review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 3rd day of May, 1951.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Petitioner on Review.

PROOF OF SERVICE OF NOTICE OF FILING
PETITION FOR REVIEW

T. C. Docket No. 16756

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

ESTATE OF R. L. LANGER, Deceased; ELEA-
NORE LANGER, Executrix,
Respondent on Review.

To the United States Court of Appeals for the
Ninth Circuit:

State of California,
County of Los Angeles—ss.

Frank O. Schelfeffer, being first and duly sworn, says: I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding

in which this Notice of Filing Petition for Review was issued.

At 12:55 p.m. on the third day of May, 1951, I served the annexed Notice of Filing Petition for Review on the following Respondent on Review named therein at the place set opposite the name of the Executrix, by delivering to and leaving with the Executrix a copy of said Notice of Filing Petition for Review and a copy of the Petition for Review and at the same time exhibiting the original of the Notice of Filing Petition for Review.

Place of Service: 6130 Blackburn Avenue, Los Angeles, California.

Name: Eleanore Langer, Executrix of the Estate of R. L. Langer, Deceased.

/s/ FRANK O. SCHELFEFFER.

Subscribed and sworn to before me this 4th day of May, 1951.

[Seal] HAZEL J. IVINS,
Notary Public.

My Commission Expires Nov. 9, 1952.

Filed T.C.U.S. May 8, 1951.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Dana Lantham, Esquire, or Austin H. Peck,
Jr., Esquire, or Henry C. Diehl, Esquire, 1112
Title Guarantee Building, 411 West Fifth
Street, Los Angeles 13, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of May, 1951, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 3rd day of May, 1951.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Petitioner on Review.

Service acknowledged.

Filed T.C.U.S. May 8, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

The Commissioner of Internal Revenue, petitioner on review herein, relies upon the following points in support of his position:

The Tax Court of the United States erred:

1. In holding and deciding that "back pay" received by the taxpayer in 1944 exceeded 15 percent of the taxpayer's gross income for this year.

2. In failing to hold and decide that the "back pay" received by the taxpayer in 1944 did not exceed 15 percent of the taxpayer's gross income for this year.

3. In holding and deciding that there is an overpayment in income tax for the year 1944 in the amount of \$2,762.46.

4. In failing to hold and decide that there is a deficiency for the year 1944 in the amount of \$3,086.48.

5. In that its opinion and decision are not supported by the evidence and are contrary to the law and regulations promulgated thereunder.

/s/ THERON L. CAUDLE,

Assistant Attorney General.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue. Attorneys for Petitioner on Review.

Statement of Service attached.

Received and filed T.C.U.S. May 31, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of the Tax Court of the United States:

Will you please prepare, certify, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit, the following portions of the record before the Tax Court of the United States:

- (1) Petition.
- (2) Answer.
- (3) Findings of Fact and Opinion of the Tax Court.
- (4) Decision of the Tax Court.
- (5) Petition for review, together with proof of service and Statement of Points.
- (6) This designation.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent on Review.

Statement of Service attached.

Received and filed T.C.U.S. May 31, 1951.

[Title of Tax Court and Cause.]

CLERK'S CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States do hereby certify that the foregoing documents, 1 to 8, inclusive, constitute and are the original papers and proceeding on file in my office as called for by the "Designation of Contents of Record on Review" in the proceeding before the Tax Court of the United States in the above-entitled proceeding and in which the respondent in The Tax Court proceeding has initiated an appeal as above-numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of June, 1951.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 12971. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Estate of R. L. Langer, Deceased, Eleanor Langer, Executrix, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed June 11, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

